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DOCKET NO. 930527

IN THE UTAH COURT OF APPEALS

BROADCAST INTERNATIONAL, INC.	)	
	)	
Petitioner,	)	Case No. 93-0527-CA
	)	
v.	)	
	)	
UTAH STATE TAX COMMISSION,	)	Priority No. 14
	)	
Respondent.	)	

BRIEF OF PETITIONER

ON WRIT OF REVIEW OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL DECISION OF THE UTAH STATE TAX COMMISSION

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FILED
Utah Court of Appeals

OCT 12 1993

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Clerk of the Court

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I. STATEMENT OF JURISDICTION

This Court has jurisdiction to entertain this appeal pursuant to Utah Code Ann. § 63-46b-16(1) (1992), Utah Code Ann. § 78-2-2(4)(1992) and Utah Code Ann. § 78-2a-3(2)(k) (1992).

II. ISSUES AND STANDARDS FOR REVIEW

The issues identified in Broadcast's Docketing Statement are repeated below.

Issue 1. Whether the Tax Commission erred in concluding as a matter of law that Broadcast's customer-subscribers did not have "the right to possession, operation or use" of Broadcast's equipment, granted under a contract, which, had the Tax Commission ruled otherwise, would have recognized Broadcast's initial purchase of the same equipment from its Utah vendors a nontaxable sale for resale.

Issue 2. Whether, assuming Broadcast is liable for Utah sales and use taxes, Broadcast is entitled to a credit against its Utah sales and use tax liability for those taxes Broadcast paid to other jurisdictions, based upon Broadcast's determination that such taxes should have been paid to those taxing jurisdictions in which the equipment is located.

Issue 3. Whether, assuming Broadcast is not entitled to such a credit, the Tax Commission has imposed a double tax on Broadcast in violation of the Commerce Clause of the United States Constitution.

Issue 4. Whether the Tax Commission erred in affirming a 10 percent negligence penalty on the entire audit deficiency against Broadcast on the basis:

(a) that Broadcast was "inattentive" to the Utah sales and use tax aspects of its operations in 1987, when (i) the audit deficiency was for the period 1987-1990 and (ii) Broadcast hired a tax firm in 1990 to help it structure its affairs so as to be lawful in all jurisdictions in which it operated;

(b) that Broadcast had taken "inconsistent" positions as to in-state and out-of-state transactions, notwithstanding the Administrative Law Judge's ruling at the formal hearing that the Tax Commission had no jurisdiction and was not competent to rule upon the merits of Broadcast's tax filings in other states; and

(c) that Broadcast had neglected its sales and use tax liability relating to the Osmond transaction, even though Broadcast in good faith believed that the transaction was not subject to sales and use taxation.

Standard of Review. The first four issues of law arise from uncontroverted facts. The proper standard of appellate review for such issues is the "correction of error" standard, by which the Tax Commission decision will be upheld only if not erroneous. Savage Industries Inc. v. Utah State Tax Commission, 811 P.2d 664 (Utah 1991). See also Utah Code Ann. § 59-1-610(1)(b) (1993).

Issue 5. Whether the Tax Commission erred in finding that Broadcast sold tangible personal property to Osmond rather than a nontaxable service.

Standard of Review. This is an issue of fact, which should be renewed based upon the whole record to determine whether the Tax Commission's ruling is supported by substantial evidence. Kennecott Corp. v. Utah State Tax Commission, 220 Utah Adv. Rep. 17 (1993).

Issue 6. Whether, assuming that Broadcast sold tangible personal property to Osmond, the Tax Commission erred in failing to honor its long-standing exemption from sales taxes for the sale of "custom" as distinguished from "canned" software, or the exemption as a "sale for resale."

Standard of Review. This is an issue of law arising from uncontroverted facts, assuming Issue No. 5 is resolved against Broadcast. The Tax Commission's conclusion of law should be reviewed under a "correction of error" standard. Savage Industries, supra; Utah Code Ann. § 59-1-610(1)(b) (1993).

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2. Utah Code Ann. § 59-12-103(1)(a) - (Impose tax).

3. Utah Code Ann. § 59-12-103(1)(l) - (Impose tax).

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The full text of each statutory provision is reproduced in Appendix C.

IV. NATURE OF CASE

A. COURSE OF PROCEEDINGS

On August 1, 1991, the Auditing Division of the Utah State Tax Commission issued a Statutory Notice against Broadcast in the total amount of $313,446.05, including $241,809.04 in

additional sales and use taxes, $24,180.92 as a negligence penalty and $47,456.09 in interest through August 31, 1991.

Broadcast timely filed a Petition for Redetermination with the Utah State Tax Commission. Following a formal hearing, the Tax Commission issued its Findings of Fact, Conclusions of Law and Final Decision dated June 10, 1993 (the "Final Decision"), sustaining the Statutory Notice as to tax, penalty and interest.

On July 8, 1993, Broadcast petitioned for review of the Tax Commission's Findings of Fact, Conclusions of Law and Final Decision through a Writ of Review to the Utah Supreme Court. By Order of the Supreme Court dated August 18, 1993, the case was transferred to this Court for disposition.

B. STATEMENT OF FACTS

Except for the additions listed below, Broadcast accepts the Tax Commission's Findings of Fact as stated in its Final Decision dated June 10, 1993, (R. 30), a copy of which is attached as Appendix A for convenience. The suggested additions are to Findings of Fact 6 and 15. Each finding needs a sentence added to acknowledge that certain satellite network uses (i.e. electronic mail, check verification and debit and credit card services) may be initiated, operated and completed by a subscriber without instructions to or involvement from Broadcast. Hearing Transcript at 44-46; 103-105.

V. SUMMARY OF ARGUMENTS

A. ISSUE 1.

BASED ON THE UNDISPUTED FACTS, THE TAX COMMISSION ERRED IN CONCLUDING THAT BROADCAST DID NOT GRANT A RIGHT TO POSSESSION, OPERATION OR USE IN ITS EQUIPMENT TO ITS SUBSCRIBERS.

The Sales and Use Tax Act, Utah Code Ann. § 59-12-101 et seq., imposes tax on "retail sales of tangible personal property within the state" and on the "storage, use or consumption of tangible personal property within the state." The statute, however, excludes or exempts from the imposition of such taxes tangible personal property purchased for "resale." A "resale" is defined as a "subsequent or second sale." The term "sale" is defined in Utah Code Ann. § 59-12-102(10) to include the grant of a right to "possession, operation or use" of tangible personal property under circumstances which would be taxable if an outright sale were made pursuant to contract for consideration. Accordingly, if Broadcast, pursuant to contract and for consideration, granted its subscribers the "possession, operation or use" of its equipment, a "sale" would have occurred for purposes of the Sales and Use Tax Act, and Broadcast's initial purchases of the equipment would be nontaxable sales for resale.

Much of the testimony at the hearing dealt with the "possession, operation or use" of the equipment by Broadcast's subscribers. The uncontroverted testimony was that Broadcast's

subscribers use the installed equipment to further their business operations and activities through in-store music and advertising, electronic mail transmissions, video teleconferencing, two-way bank debit and credit transfers and other applications. The auditors admitted that Broadcast's subscribers possessed the equipment. Notwithstanding, the Tax Commission's Final Decision held as a matter of law that Broadcast did not "grant" possession, operation or use of the equipment to its subscribers, and therefore did not purchase the equipment "for resale." This conclusion disregards all evidence presented below and is not a proper construction of the relevant statute. Accordingly, the Tax Commission's holding should be reversed.

B. ISSUE 2.

BROADCAST IS ENTITLED TO A CREDIT AGAINST ITS UTAH SALES AND USE TAX LIABILITY FOR THOSE TAXES BROADCAST PAID TO OTHER JURISDICTIONS.

Utah Code Ann. §§ 59-1-801 and 59-12-104(28) provide for a credit to taxpayers for sales or use taxes paid to another state or jurisdiction on the same property or transaction. Notwithstanding the clear and unambiguous language in these sections, the Tax Commission interprets them as containing "implied" conditions, to-wit (1) taxes paid to another state only apply if "properly" paid as determined by the Tax Commission; and (2) the state that can make the first conceivable claim of taxation has precedence in payment over any other jurisdiction.

Relying on these unstated requirements in the statute, the Tax Commission concluded that Broadcast may not claim a credit against its Utah tax liability for taxes paid to other jurisdictions. Such a conclusion is a gross distortion of the statutory language and must be reversed.

C. ISSUE 3.

IF BROADCAST IS NOT ENTITLED TO A CREDIT, THE TAX COMMISSION HAS IMPOSED A DOUBLE TAX ON BROADCAST IN VIOLATION OF THE COMMERCE CLAUSE.

Under the Commerce Clause of the United States Constitution, a state may not impose a tax upon property in interstate commerce which would unduly burden that commerce. In Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977), the United States Supreme Court formulated a four-prong test to determine whether a state tax can withstand scrutiny under the Commerce Clause. To meet the second prong of the Complete Auto Transit test, a tax must be fairly apportioned. Fair apportionment, in turn, relies on an "internal" and "external consistency" test. The "external consistency" test asks whether the state has taxed only that portion of the revenues from the interstate activity which reasonably reflects the interstate component of the activity being taxed. This is similar to the third prong of the Complete Auto Transit test -- the tax may not discriminate against interstate commerce.

Under the facts of the present case, if the Utah tax is upheld and credit relief is denied, the equipment installed at subscriber locations in Utah will be subjected to only one sales use tax, while the equipment installed in out-of-state locations will be subjected to two sales/use taxes -- once in Utah and once in the out-of-state jurisdiction. Such a scheme clearly burdens interstate transactions as juxtaposed to similar intrastate transactions, and is, thus, unconstitutional.

D. ISSUE 4.

THE TAX COMMISSION ERRED IN AFFIRMING A TEN PERCENT NEGLIGENCE PENALTY ON THE ENTIRE AUDIT DEFICIENCY.

The Tax Commission imposed a penalty on the grounds that Broadcast was inattentive to its responsibilities for the collection and payment of sales/use taxes. However, the testimony at the hearing was that in 1988 Broadcast instituted a sales/use tax policy and thereafter utilized that policy in paying its tax liabilities. The penalty therefore, seems to be justified on the lack of a sales tax policy in 1985 and 1986, years outside of the audit period.

Further, the penalty does not consider recognized case law establishing "negligence" in the tax context. The case law is to the effect that a taxpayer is not negligent if it had a reasonable or "good faith" basis for its position. Under the facts, the statutory definition of the term "sale" certainly

supports Broadcast's claim that it purchased equipment in Utah with a "resale" intent. It would be unfair to characterize the disagreement between the Tax Commission and over the intent and breadth of technical statutory terms as being without merit or taken in "bad faith." The imposition of a negligence penalty is in error as a matter of law.

E. ISSUE 5.

THE TAX COMMISSION ERRED IN FINDING THAT BROADCAST SOLD TANGIBLE PERSONAL PROPERTY TO OSMOND RATHER THAN A NONTAXABLE SERVICE.

At the formal hearing, Broadcast's General Counsel testified that the alleged "sale" from Broadcast to Osmond actually related to Osmond's use of Broadcast's studio to develop a "master tape" which Osmond then duplicated at non-Broadcast facilities and resold to its customers. No other testimony about the transaction was presented. In direct contravention of this testimony, the Tax Commission ruled that Broadcast sold "master recording tapes" to Osmond. This ruling is not supported by the evidence and must be reversed.

F. ISSUE 6.

THE TAX COMMISSION ERRED IN FAILING TO HONOR ITS LONG-STANDING EXEMPTION FROM SALES TAXES FOR THE SALE OF "CUSTOM" AS DISTINGUISHED FROM "CANNED" SOFTWARE.

If the Tax Commission's finding that tangible personal property was sold by Broadcast to Osmond, notwithstanding the direct testimony to the contrary, then the taxation of such a sale

violates a long-standing Tax Commission policy. The audit years in question are 1977 through 1990. During such years, there was no statute or rule which allowed the taxation of software. Rule R865-19-92S, allowing "software taxation" was promulgated in 1991. The policy prior to that time was not to tax "custom" software. Any tape created by Osmond at Broadcast's studios was unique to Osmond. Further, the sale was a "sale for resale" inasmuch as Osmond would take the tape and have it duplicated for subsequent sale to Osmond's customers. An exemption certificate was provided to the Tax Commission demonstrating the "sale for resale" claim. Any taxation of the Osmond transaction is improper and must be reversed.

VI. ARGUMENTS AND SUPPORTING AUTHORITIES

A. ISSUE 1.

BASED ON THE UNDISPUTED FACTS, THE TAX COMMISSION ERRED IN CONCLUDING THAT BROADCAST DID NOT GRANT A RIGHT OF POSSESSION, OPERATION OR USE IN ITS EQUIPMENT TO ITS SUBSCRIBERS.

During the audit years in question, Broadcast purchased satellite communications equipment, primarily receivers, from selected Utah vendors, held the equipment for a short time (typically no more than 24 hours) in Utah and then shipped the equipment to out-of-state installation sites for use. On audit, the Tax Commission assessed tax against Broadcast for these purchases under two independent theories. The first theory invoked

Utah Code Ann. § 59-12-103(1)(a) which taxes every "retail sale of tangible personal property within the state." The second theory relies on Utah Code Ann. § 59-12-103(1)(1) relating to "tangible personal property stored, used, or consumed in this state."

While Broadcast concedes it purchased equipment from Utah vendors, it argued that such purchases were not "retail sales" for purposes of Utah Code Ann. § 59-12-301(1)(a), and were not "stored" in Utah as defined in Utah Code Ann. § 59-12-103(1)(l). The definitions of "retail sale"[1] and "storage,"[2] contained in the Sales and Use Act, both contain exclusions for property held for resale. Consequently, under either theory advanced, if the satellite communications equipment which Broadcast purchased was "held for resale" and actually "sold" to its subscribers, Broadcast would not be liable to Utah for either a sales tax or a use tax.

The Tax Commission's decision defined "resale" to include a "subsequent sale" as defined under the Sales and Use Tax Act. Utah Code Ann. § 59-12-102(10), in pertinent part, defines "sale":

> "Sale" means any transfer of title, exchange or barter, conditional or otherwise, <u>in any manner</u>, of tangible, personal property or any

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[1] The term "retail sale" is defined in Section 59-12-102(8)(a) to mean "any sale within the state of tangible personal property or any other taxable item or service under Subsection 59-12-103(1), <u>other than resale of such property</u>, item, or service by a retailer or wholesaler to a user or consumer." (Emphasis added.)

[2] The term "storage" is defined in Section 59-12-102(12) to mean "any keeping or retention of tangible personal property or any other taxable item or service under Section 59-12-103(1), in this state for any purpose <u>except sale in the regular course of business</u>." (Emphasis added.)

> other taxable item or service under Subsection 59-12-103(1), for a consideration. It includes:
>
> . . .
>
> (e) any transaction under which right to possession, operation or use of any article of tangible personal property is granted under a lease or contract and the transfer of possession would be taxable if an outright sale were made. (Emphasis added.)

Broadcast issued exemption certificates to its vendors claiming that the equipment purchased was a nontaxable "sale for resale." Broadcast intended that the "right to possess, operate or use" that equipment be, and in fact, was transferred to Broadcast's subscribers, pursuant to contract; and that such a transfer of possession would have been a taxable sale had title passed.

Agreeing with Broadcast's view of the statutory scheme and framing of the legal issues, the Tax Commission nonetheless ruled in favor of taxation by concluding that:

> With respect to the right of possession, Broadcast grants no such right to its subscribers. . . .
>
> Under such circumstances [relating to operation], the subscriber's ability to turn the receiver on or off, push a button to obtain a status report or increase the volume does not constitute the "right to operate" the equipment. . . .
>
> Once again, based upon Broadcast's service agreements with its subscribers as well as Broadcast's actual practice, the subscriber only has the "right" to receive services from Broadcast, but no right or power over the

tangible property which delivers the services.

Final Decision R. 41-42.

The Tax Commission's Decision is manifestly wrong. For the reasons specified sequentially below, a fair and reasonable application of Utah Code Ann. § 59-12-102(10)(e) inescapably leads to the conclusion that a "sale" (as defined in the Sales and Use Tax Act) occurred between Broadcast and its out-of-state subscribers. Any sales tax or use tax on such transactions would thus be due from the subscribers to the taxing jurisdiction in which the "sale" occurred, according to its law, and not to Utah.

1. The Literal Statutory Language of Section 59-12-102(10)(e) Supports Broadcast's Interpretation and Flatly Contradicts That of the Tax Commission.

Based upon the literal words of Utah Code Ann. § 59-12-102(10)(e), and the commonly accepted definition of those words, Broadcast "sold" satellite communications equipment to its subscribers. In reaching that conclusion, Broadcast addresses three aspects of the statutory language the Tax Commission's analysis ignores. One, the statute specifically does not make transfer of title a prerequisite to a "sale." Instead, the test is whether the transaction "would be taxable if an outright sale were made," not the passage of title. (Emphasis added.) Two, the statute does not require the "seller to lease tangible personal

property to the purchaser." The statute says "lease or contract."[3] The reasonable inference of the statutory language is that the Utah Legislature intended all contracts or agreements, whereby rights to tangible personal property were granted from a "seller" to a "purchaser" to be included as taxable transactions, including service agreements. Three, the statute does not require that the "purchaser" possess, operate and use the property transferred to it. Instead, the statute says that the "seller" must grant the "right" to "possession, operation or use," thereby making the statutory coverage considerably broader (i.e. it attaches to a "right" whether exercised or not) and disjunctive (i.e. it attaches where the seller transfers the right of possession or operation or use). Any one of the three conditions would satisfy the statutory language.

Other provisions of the Sales and Use Tax Act support these interpretations and conclusions. For instance, the "storage" of tangible personal property, which is taxable under Section 59-12-103(1)(l), is defined in Section 59-12-102(12) to mean "keeping

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[3] Throughout the proceedings, the Tax Commission has assumed, argued and interpreted Section 59-12-102(10)(e) as applicable only to written leases. This is manifest error. The express language of this section includes all contracts, whether oral, written, leases or some other grant of possession. In Tasters Ltd., Inc. v. Department of Employment Security, No. 920659-CA, slip op. (Ut. App. Sept. 24, 1993) this Court reversed the Board of Review of the Industrial Commission, in part, because it had indulged in the same kind of overreaching as does the Tax Commission here. Said the Court, "Initially, the Board appears to interpret "pursuant to contract" to require a written contract . . . [M]aking this kind of extra legislative embellishment to the statute is inappropriate." Id. at 10 (emphasis in original).

or retention of tangible personal property . . . , in this state for any purpose except sales in the regular course of business." (Emphasis added). Likewise, Section 59-12-104(28) provides an exemption for "property purchased for resale in this state, in the regular course of business, either in its original form or as an ingredient or component part of a manufactured or compounded product." Viewed as a comprehensive whole, these provisions are intended to tax the sale or use of tangible personal property only once. Consequently, wholesale purchases by lessors and sellers who transfer the right to possess, operate or use equipment whether or not coupled with any service they may sell, are not liable for the sales or use tax.

2. Based Upon the Undisputed Facts of This Case, Broadcast's Subscribers Had the Right of Possession or Operation or Use of Broadcast's Equipment Pursuant to Contract.

Any honest application of the law to the undisputed facts of this case leads to the conclusion that a "sale" within the meaning of Utah Code Ann. § 59-12-102(10)(e) between Broadcast and its subscriber occurred. Each of the service agreements between Broadcast and its subscribers is, obviously and undisputedly, a contract. The Tax Commission also recognizes that the "course of conduct" between the parties can be a part of such agreements. Final Decision R. 41. Each agreement is for consideration and binds the parties by extending certain benefits and imposing

certain burdens. Again, the Tax Commission does not conclude otherwise.

However, the Tax Commission concludes that "Broadcast grants no right [of possession, operation, or use] to its subscribers." Id. This conclusion is irreconcilably at odds with the testimony given at the hearing.

Language from a contract selected at random (R. Contracts Folders-No. 7 at 2) provides:

> 3. Transmission Responsibility. To enable Subscriber to receive Company's service, Company shall furnish, install and keep in good operating condition all equipment necessary to receive audio transmissions via satellite during the term of this Agreement. It shall be the Participating Retail Store's responsibility to keep the equipment in an operational mode, i.e., tuned to the proper frequency and to perform other on site ministerial tasks. (Emphasis added.)

Broadcast's obligation to "furnish and install" equipment at each subscriber location is, by any reasonable interpretation of the language, a "grant" to the subscriber of legal rights to have (possess) and use the equipment. Moreover, under the parties' course of conduct throughout the years, the subscribers clearly "possess, use and operate" the equipment for the enhancement of their business activities and operations.

The Tax Commission's dogged refusal to read the contract reasonably and within the context intended by the parties lead

Broadcast to introduce substantial testimony at the hearing as to the parties' intentions and their course of conduct over the years. Testimony was given by Broadcast officers and also a subscriber. All the witnesses unequivocally testified that Broadcast intended to and did grant "possession, use and operation" of the equipment to the subscribers.[4] See Appendix B for numerous excerpts of the hearing testimony. Even the Tax Commission auditors admitted that the subscribers had possession of the equipment. Hearing Transcript at 371-372. See also Deposition of Rick Mitchell at 12-13.

The Tax Commission recognized in its Findings of Fact:

> Broadcast's employees or contractors install the necessary equipment at each subscriber's location. Satellite dishes are typically mounted on the building's roof and attached to the building's framework. Cables connect the external equipment to the other components, which are usually located in a secure office.

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[4] For example, Dwight Egan, the President of Broadcast, in response to a question regarding how the subscribers were granted the right to possess the equipment installed at each location testified: "They have a grant of right through this contract [service agreement]. . . . If our contract said we are going to grant you possession, operation and use, I don't know that that would change things here." Hearing Transcript at 81-82.

John Lasater, Manager of Store Systems for SaveMart Supermarkets, a subscriber, testified that SaveMart had equipment installed in 94 of its stores and that it daily and hourly used the equipment to further its business operations and activities through in-store music and advertising, electronic mail, video conferencing and a two-way bank debit and credit system. He further stated that possession, use and control of the equipment resided in SaveMart. Hearing Transcript at 89-105.

> Broadcast usually obtains any permits necessary for the installation of its equipment at the subscriber's location.

Final Decision R. 33.

From the overwhelming evidence presented at the hearing (and there was not a whisper of testimony or evidence to the contrary), it would be disingenuous (if not dishonest) to conclude that the subscribers do not have a right to possess, use, or operate Broadcast's equipment. However, refusing to admit the sun "rising in the East," the Tax Commission, without discussion or explanation, concludes that Broadcast does not "grant" its subscribers the right to possession of its equipment. This conclusion is incredulous and patently wrong for several reasons.

One, it is directly contrary to the uncontroverted testimony of all witnesses as to the "intent" of the contract provisions and the course of conduct between Broadcast and its subscribers. See Appendix B.

Two, the service agreements state and the Tax Commission found that "Broadcast employees or contractors install the necessary equipment at each subscriber's location." Implicit within this finding is a recognition that, by mutual consent of the parties, Broadcast contractually grants possession of the equipment to the subscriber. That is, if the equipment is located at the subscriber's store as a matter of undisputed fact, the subscriber could only have obtained possession of the equipment either

lawfully or unlawfully. There was no suggestion that the subscribers stole, extorted, or unlawfully took possession of or received the equipment at their locations. The only other possibility, therefore, is that the subscribers have the equipment at their locations lawfully; that is, pursuant to an agreement with Broadcast. The only honest and logical conclusion from these undisputed facts is that Broadcast did indeed grant its subscribers the right to possess the satellite equipment.

Three, the Tax Commission, in interpreting Utah Code Ann. § 59-12-102(10)(e) relied exclusively on the definition of possession found in Black's Law Dictionary, rather than the statute itself. This, likewise is manifest error. The Tax Commission, quoting Black's Law Dictionary, defines possession as:

> The detention and control, or the manual or ideal custody, of anything which, may be the subject of property, for one's use and enjoyment, either as owner or as the proprietor of a qualified right in it and either held personally or by another who exercise it in one's place and name. Act or state of possessing, that condition of facts under which one can exercise his power over a corporeal thing at his pleasure to the exclusion of all others.

Final Decision R. 37. (Emphasis added.)

Apparently applying this definition of "possession," the Tax Commission concludes that "Broadcast grants no right [of possession] to its subscribers." Id. at 40. There is no basis or analysis. The Tax Commission simply claims "Broadcast grants only

the right to receive various services." Id. For reasons discussed above, such conclusion flies in the face of testimony and the Tax Commission's own Findings of Fact. More important to the point here, however, is that the Tax Commission ignores its own definition of possession. Broadcast's subscribers have "manual or ideal custody" because the equipment is physically attached on their property.[5] Broadcast cannot have access to the equipment (locked in the store manager's office) without the subscriber's consent. To maintain, as does the Tax Commission, that such activities do not qualify as possession of the equipment distorts the very definition of the word "possession" supplied by the Tax Commission.

Most important, the Tax Commission, without so much as an acknowledgement, ignores the definition of possession found in Utah Code Ann. § 59-12-102(10)(e) which is:

> such transfer of possession would be taxable if an outright sale were made.

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[5] The subscribers, just as obviously, have a "qualified" right in the property because (i) the property is physically located at their store with the consent of Broadcast; (ii) the subscriber communicates any desired changes in services to Broadcast which then implements those changes; (iii) the subscribers operate the volume controls and "status" buttons to generate printouts for trouble shooting purposes (iv) the printers require paper input and adjustment by the subscribers; (v) the printers and other peripheral equipment require cartridge changes and maintenance by the subscribers; (vi) the subscribers are contractually bound to indemnify Broadcast for damage, destruction or loss to the equipment while it is at the subscriber's location; and (vii) certain subscribers use the equipment for applications unrelated to Broadcast services, including check authorization, bank debit and credit, and electronic mail.

Under this statutory language, the appropriate question the Tax Commission should have asked, but did not, is what possession means under Utah law. The Utah Supreme Court, in Young Electric Sign Company v. Utah State Tax Commission, 4 Utah 2d 242, 291 P.2d 900 (1955), construed the predecessor statute to Utah Code Ann. § 59-12-102(10)(e) to answer that question.[6] In Young, the taxpayer agreed with its customers to construct electrical signs, install them on the customer's premises, and maintain the signs. Title to the signs remained with Young. The customer had the right to advertise on Young's sign. Young argued that its "sales and repair and maintenance" were not taxable since it had a "service agreement" with the customer.

The Utah Supreme Court disagreed. Citing Utah Code Ann. § 59-5-2(g) (1953) (the predecessor to Utah Code Ann. § 59-12-102(10)(e) (1990)), the Court held the transaction was a taxable "sale":

> This statute is not ambiguous. It is not controverted that the transfer of possession of the signs under the rental contracts herein involved are such that if outright sales were made they would be taxable under this section. In such event, the plain wording of the statute requires the taxes to be computed upon the rentals paid. What elements enter into the charges for these rentals can be of no materiality.

Id. at 902 (emphasis added).

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[6] The Tax Commission's decision does not even mention Young although the case was extensively briefed and argued at the formal hearing.

The Court continued to explain:

> The material fact is that there is transfer of the right to continuous possession of personal property, the possession of which under a contract or lease would be taxable if an outright sale were made, and as we pointed out in the case of the original rental agreement, it is the charges for these agreements which are taxable and not the various elements which enter into the determination of these charges.

Id. at 903 (emphasis added).

In this case, Broadcast grants by contract possession and use and operation of the satellite equipment to the subscriber, which would be, absolutely indisputably, a taxable sale had title transferred to the subscriber. Hence, the transaction between Broadcast and the subscriber is a "sale" within the express language of Utah Code Ann. § 59-12-102(10)(e). The only significant distinction between Young and this case is that Broadcast transferred possession of tangible personal property to its subscribers outside of Utah which means that those sales are not taxable by Utah.

This conclusion is further supported by the legislative history of Utah Code Ann. § 59-12-102(10)(e). The Utah Legislature intended that this statute be broadly based so as to capture any kind of transaction where a taxpayer sought to avoid taxation on a transfer of possession simply by claiming that legal title or ownership did not pass from one party to the other. Since Young, the Utah Legislature has broadened the statute to make its "catch

all" base even clearer. The statute at issue in Young required "continuous possession or use" for a sale to have occurred, whereas, in this case, a sale covers "any transaction under which right to possession, operation, or use" is granted. At the time of audit, possession was no longer modified by the word "continuous." Moreover, the word "operation" has been added to possession or use. The effect of these word changes is to broaden the statutory definition of "sale". Likewise, the addition of "any transaction" suggests a legislative intent to expand the taxation net without limitation and in its broadest sense.

In Young, the Tax Commission interpreted the predecessor to Utah Code Ann. § 59-12-102(10)(e) broadly to preclude the taxpayer from avoiding taxation. In this case, the Tax Commission has flip-flopped to read the same statute narrowly so that under these circumstances, the taxpayer is likewise ensnared in Utah's taxation web. By reversing its prior interpretation of Utah Code Ann. § 59-12-102(10)(e) (from a liberal to a narrow construction) the Tax Commission has made Broadcast's initial purchases from its vendor taxable in Utah. Such Machiavellian interpretations of Utah Code Ann. § 59-12-102(10)(e) are unfair, erroneous and must be reversed.

3. The Taxable Transaction in This Case Should be the Consumer-Subscriber's Use of the Equipment in Their Respective States, and According to Their Law.

Utah case law supports Broadcast's claim that the subscriber, not Broadcast, should pay sales or use taxes on the equipment the subscriber possesses. In BJ-Titan Services v. State Tax Commission, 842 P.2d 822 (Utah 1992), the Utah Supreme Court advanced two modes of analysis in determining whether the tangible personal property used in rendering the service is taxable. The first is called "an essence of the transaction" test. If the transaction is an "inseparable combination of tangible personal property and services," the issue to decide is whether the "essence of the transaction" is either the sale of tangible personal property (in which case the sale is taxable) or the sale of service (in which case the sale is not taxable). Id. at 825.[7] If on the other hand, tangible personal property is used "in the process of . . . rendering services," the issue is "who is the ultimate user or consumer of the tangible personal property" and who, as the ultimate consumer, should pay the sales or use tax. Id. This is the ultimate consumer test.

In this case, the second mode of analysis is appropriate because identifiable, separable, tangible personal property, i.e., (the satellite receiving equipment) is used in rendering a service

[7] Pursuant to Utah Code Ann. § 59-1-610(1)(b) (1993) this would no longer be an issue committed to agency discretion.

(i.e., the transmission of electronic signals). Who then is the ultimate consumer? Who should pay the use tax -- Broadcast or the subscriber?

In deciding such issues, the BJ-Titan Court explained that the professional services category falls along a spectrum of cases where some purchases are taxable and some are not. On the one extreme of the spectrum are manufacturers whose purchases are not taxable because the ultimate consumer is the purchaser of the manufactured product. The consumer and not the manufacturer pays the sales tax. On the other extreme are contractors who pay a sales tax on all their purchases because they are the ultimate consumers of tangible personal property inasmuch as they transform the identity of tangible personal property into real property.

Near the manufacturing end of the spectrum is the automobile repair category, where purchases by mechanics are not taxable. As the Court explained, "here, the customer, not the repairer, is the ultimate consumer of auto parts because the parts are installed without alteration and can be easily separated from the labor performed in installing them." Id. at 827 (emphasis added.)

Broadcast, in that sense, is indistinguishable from an automobile mechanic. Broadcast provides its communication network services to its subscribers. Necessarily connected with the subscriber's receipt of those services is the subscriber's

possession, use or operation of certain tangible personal property. As with the automobile mechanic, the ultimate consumer of the satellite equipment in this case is the subscriber because the equipment is installed without alteration and can be easily separated from the installation labor and the network services. Before and after installation, the equipment's identity remains unchanged. Just as the current owner "uses" the equipment supplied by the mechanic, the subscriber "uses" the equipment supplied by Broadcast. Consequently, the subscriber should pay whatever use tax may be imposed upon the equipment's use according to the law of the subscriber's jurisdiction.[8]

In summary, as the Tax Commission stated in its Decision, the issue is whether Broadcast purchased satellite receiving equipment from Utah vendors, and "resold" that equipment to its subscribers. If so, the initial purchase was a nontaxable "sale for resale." In deciding whether Broadcast "resold" its equipment to its subscribers, the Tax Commission concluded that Broadcast did not "grant possession, use or operation" of the equipment to its subscribers. This conclusion of law is disingenuous and manifestly without merit. It flies in the face of the undisputed facts and the statutory definition of the term "sale."

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[8] The Tax Commission's reliance on Nucor Steel v. State Tax Commission, 832 P.2d 1294 (Utah 1992) in its Response to Docketing Statement is frivolous. In Nucor the taxpayer consumed, and changed the identity of the materials at issue. Here the equipment is not taken out of the boxes in which they are sold to Broadcast.

B. ISSUE 2.

BROADCAST IS ENTITLED TO A CREDIT AGAINST ITS UTAH SALES AND USE TAX LIABILITY FOR THOSE TAXES BROADCAST PAID TO OTHER JURISDICTIONS.

If, notwithstanding the arguments made under Issue 1, this Court sustains the Tax Commission's decision, then Broadcast is entitled, as a matter of law, to receive a credit for the taxes paid to the other states.

The Multistate Tax Compact as adopted and codified at Utah Code Ann. § 59-1-801 (1987) provides:

> Article V - Elements of Sales and Use Tax Laws Tax Credit.
>
> 1. Each purchaser liable for a use tax on tangible personal property shall be entitled to full credit for the combined amount or amounts of legally imposed sales or use taxes paid by him with respect to the same property to another state or any subdivision thereof.

In addition to the language of the Multistate Tax Compact, the Utah Legislature has enacted Utah Code Ann. § 59-12-104(28) which provides:

> The following sales and uses are exempt from the taxes imposed by this chapter:
>
> . . .
>
> (28) Property upon which a sales or use tax was paid to some other state, or one of its subdivisions, except that the state shall be paid any difference between the tax paid and the tax imposed by this part and part 2, and no adjustment is allowed if the tax paid was greater than the tax imposed by this part and Part 2; (emphasis added.)

The express intent of both statutes is to provide a credit for taxes paid to another jurisdiction. The Tax Commission, however, argues that Broadcast misinterprets the "intent" of the statutes, and that there are unstated conditions in the statutes, to-wit: (i) any tax paid to another jurisdiction only applies if it was "properly" paid; and (ii) the state that can make the first conceivable claim for taxation has precedence in payment over any other jurisdiction. These conditions imply that someone, presumably the Tax Commission, is entitled to make a determination of when the other state's taxes are "properly" due and payable, and if even "properly" payable, the credits can be ignored if Utah can claim the first incidence of taxation.

Such "implied conditions" in the statute are fallacious for a number of reasons. One, the Utah State Tax Commission is not competent nor empowered to rule on or interpret another state's tax laws. Two, the Utah State Tax Commission is not entitled to rewrite or amend Utah's existing statutes. The statutes on their face are unambiguous and need not resort to rules of construction to ascertain their plain meaning. The best evidence of the legislature's intent is the precise language of the statute. See Chris & Dicks Lumber v. Tax Commission, 791 P.2d 511 (Utah 1990). The Tax Commissions's attempt to interpret and write conditions into the statute is an usurpation of the legislative power and is void ab initio.

Broadcast's research reveals only two court cases which judicially interpret Article V of the Multistate Tax Compact and the applicability of the credit. The cases are Chicago Bridge & Iron Co. v. State Tax Commission, 839 P.2d 303 (Utah 1992) and Wyoming v. Sinclair Pipeline Co., 605 P.2d 377 (Wyo. 1980).

The rationale of these cases are in some respects opposite, even though both cases uphold the imposition of additional tax burdens on the taxpayer. In Chicago Bridge & Iron Co., the Utah Supreme Court sustained a sales tax on the taxpayer's purchase of steel materials and other products used in the fabrication of large steel tanks in Utah, where following fabrication, the tanks were transported to the State of California and installed on cement foundations. The taxpayer had paid a use tax to California pursuant to its law. In upholding the imposition of the sales tax, the Utah Supreme Court accepted the findings of the Tax Commission that Chicago Bridge & Iron Company was a real property contractor, rather than a manufacturer, and thus the consumer or end user of the fabrication materials.

In response to the taxpayer's assertion that Utah's tax was an unconstitutional "double tax" of the same transaction, the Utah Supreme Court ruled no double taxation would occur based upon language of Article V of the Multistate Tax Compact. The Court said:

> Under this article [Article V of the Multistate Compact], California, in imposing a use tax, must give credit against that tax for any Utah sales tax levied, since "precedents in liability shall prevail over precedents in payment". Resolution of Multistate Tax Commission (1980). Accordingly, the imposition of the Utah sales tax in this case should not result in double taxation. If it does, the remedy lies in the state that seeks to impose the tax having that effect.

Id. at 309. (Emphasis added.)

In the other case, Wyoming v. Sinclair Pipeline Co., supra, the taxpayer, Sinclair Pipeline Co., purchased pipe in Colorado which was ultimately installed in a pipeline located in Wyoming. The company paid a Wyoming use tax on the installation of the pipe. Two years thereafter the Colorado taxing authorities assessed a tax deficiency on the same pipe claiming that the "first incidence of taxation" took place in Colorado. Sinclair Pipeline Co. then paid the assessed Colorado sales tax and filed for a refund from the State of Wyoming. The Wyoming Supreme Court, also interpreting Article V of the Multistate Tax Compact, ruled that Sinclair Pipeline was not entitled to a refund. It stated:

> The statute says that a taxpayer who has "paid" his tax to one state will receive a credit upon any tax which may be due another state on that same property. In the instant matter, Sinclair had paid the Wyoming tax before Colorado ever assessed the taxpayer. If Sinclair owed the State of Colorado a tax, it was a sum less the amount it had paid Wyoming. That is what the statute says. (Emphasis in original.)

The Court went on to say:

> Where there is plain unambiguous language used in a statute there is no room for construction and a court may not properly look for and impose another meaning. . . . The statute says nothing about the "first taxable incident" and while Sinclair argues that the statute is clear and unambiguous on its face and therefore we need not look further to ascertain its meaning, Sinclair in fact finds it necessary to look past the plain words of the statute to a rule of use tax law in order to reach the conclusion it urges.

The Court pointed out that:

> . . . once Sinclair paid Wyoming the tax it was entitled to a deduction in that amount from any tax due Colorado. If Sinclair did not choose to assert this right and instead elected to pay Colorado's tax without deducting what it had previously paid Wyoming, that is not Wyoming's fault.

Id. at 379.

This Court should follow the Sinclair Pipeline rationale because Chicago Bridge & Iron is inapplicable to and cannot be squared with the facts of this case.

One, Sinclair Pipeline is faithful to the statutory language. Article V of the Compact says "taxes paid," as the Wyoming Supreme Court recognized. The law is Article V, not whatever the Multistate Tax Commission (a voluntary association) wishes it to be. Two, since the decision in Sinclair Pipeline in 1980, there has been ample opportunity for the Multistate Tax Commission to change the model language in Article V if a change

was warranted. No amendments or changes have been adopted. Three, and most importantly, the Utah State Legislature has not seen fit to amend the statute to include the language the Tax Commission argues is the proper interpretation of Article V of the Multistate Tax Compact. Until the statutory language is changed by the legislature, neither the Tax Commission nor the Courts are free to read additional conditions into the present clear and unambiguous statutory language.

Moreover, there are many substantive differences between the facts in Chicago Bridge & Iron Co. and the present case. First, in Chicago Bridge & Iron Co., raw materials such as sheet metal, rivets and bolts were purchased by the taxpayer and manufactured and fabricated into tanks and related devices in Utah. At least in some instances the fabricated tanks were then transported to and permanently attached to real property outside of Utah. The controversy in the case centered on whether the taxpayer, Chicago Bridge & Iron Co., was a "manufacturer" or a "real property contractor." Taxation by Utah turned exclusively on that determination. In the present case, neither the "manufacturer" nor the "real property contractor" concepts have any applicability.

Second, the specific holding in the Chicago Bridge & Iron Co. turns on the fact that the taxpayer purchased, manufactured and fabricated materials into tanks and other final products in Utah.

As such, those materials were "all used within the state by the taxpayers." Id. at 308. In the present case, Broadcast purchased fully completed, operational receivers from Utah vendors. The Utah vendors packaged the receivers. Broadcast, without so much as even opening the boxes, immediately shipped the equipment to its out-of-state installation sites. Chet Paulsen's testimony in the Tax Commission hearing was that the receivers were generally shipped from Utah to the out-of-state sites within 24 hours of their receipt. No fabrication, modification, manufacturing or repackaging of any kind was done by Broadcast on the receivers. The equipment was not "used within the state by the taxpayer" (Broadcast) in any way.

A third important distinction between Chicago Bridge & Iron Co. and the present case is that the credit which the Utah Supreme Court said California "must" give is unavailable to Broadcast in those states that are not Multistate Tax Compact members. The Supreme Court's holding in Chicago Bridge & Iron Co. is expressly dependent on the language of the Multistate Tax Compact, of which Utah and California are members, to the effect that California "must give credit" for any tax paid to Utah. Sinclair Pipeline demonstrates the inherent unfairness and naiveté of that position. But, even assuming the Utah Supreme Court is right, only 18 states and the District of Columbia are members of the Multistate Tax Compact. Testimony at the hearing indicated

that Broadcast has subscribers in virtually all 50 states and in some foreign countries. Accordingly, even if the Utah Supreme Court's Multistate Tax Compact credit analysis is correct, it fails to provide any reasonable allowances in the other 32 plus jurisdictions wherein Broadcast does business. This problem is particularly exacerbated by states, such as Nevada, which do not provide any credit relief. Thus, the Court's analysis is shallow and fails to address the problems it creates in the majority of the states wherein the Multistate Tax Compact does not apply.

Clearly the Tax Commission's implied conditions to the granting of a credit will not "avoid duplicative taxation" if the states can merely interpret Article V for their own selfish purposes as evidenced by the results of Chicago Bridge & Iron Co. and Sinclair Pipeline Co.

C. ISSUE 3.

IF BROADCAST IS NOT ENTITLED TO A CREDIT, THE TAX COMMISSION HAS IMPOSED A DOUBLE TAX ON BROADCAST IN VIOLATION OF THE COMMERCE CLAUSE.

Under the Commerce Clause of the United States Constitution a state may not impose a tax upon property in the flow of interstate commerce which would unduly burden that commerce. In the landmark case of Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977), the United States Supreme Court enunciated an oft-used four-prong test to determine whether a state tax will withstand

scrutiny under the Commerce Clause. The four prongs of the test are:

(1) Is the tax applied to an activity with a substantial nexus to the taxing state;

(2) Is the tax fairly apportioned;

(3) Does the tax discriminate against Interstate Commerce; and

(4) Is the tax fairly related to the services provided by the state.

A focus on the second and third prongs of the Complete Auto Transit test is warranted under the facts of this case. As will be demonstrated, without allowing the credits argued under Issue 2 above, the Utah's imposed tax will not pass constitutional scrutiny.

The second prong of the Complete Auto Transit test is fair apportionment. The central purpose behind the fair apportionment requirement is to ensure that each state taxes only its fair share of an interstate transaction. Goldberg v. Sweet, 488 U.S. 252 (1989) at 260. In Goldberg the court stated that it determines whether a tax is fairly apportioned by examining whether the tax is internally and externally consistent. To be internally consistent, the tax must be so structured that if every state were to impose an identical tax, no multiple taxation would result. Id. at 261. To be externally consistent, the Goldberg court stated:

> The external consistency test asks whether the state has taxed only that portion of the

> revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed. [citations omitted.] We thus examine the in-state business activity which triggers the taxable event and the practical or economic effect of that tax on that interstate activity. Id. at 262.

This test is clearly violated under the Tax Commission's application of the law. As described under Issue 1, the Tax Commission has imposed the tax under two separate theories: (1) the purchase of the satellite equipment from Utah vendors; or (2) the storage of the purchased equipment in Utah. The approximately 800 different taxing jurisdictions (states, counties and cities) wherein the satellite equipment is installed, have imposed sales/use taxes premised on the installation, presence and use of the satellite equipment therein. No apportionment of the tax has occurred between Utah and the other jurisdictions.

Under Utah's theory, if the equipment was installed within the state of Utah, that equipment would only be taxed once by Utah. But if the equipment was installed outside of Utah, that equipment would be subject to double taxation, once for its purchase/24-hour storage in Utah and once for its installation, presence and use outside of Utah. This is blatant burdening of interstate commerce.

The Tax Commission argues that the Utah Supreme Court's holding in Chicago Bridge & Iron allows it to tax Broadcast's

purchases despite the Commerce Clause. Such claims are not well founded. Unlike Chicago Bridge & Iron, Broadcast did not fabricate, manufacture or modify the equipment in Utah in any way. The equipment remained as originally packaged by the manufacturer. No value was added to the goods by Broadcast in Utah. The equipment merely passed through Utah on its journey to its intended installation site, whether in Utah or outside of Utah.

The third prong of the Complete Auto Transit test prohibits the state from imposing a discriminatory tax on interstate commerce. This rule is a fundamental tenet of the Commerce Clause. As described above, the tax, as applied by the Tax Commission, clearly discriminates against interstate commerce. Equipment installations in Utah will be subjected to only one sales/use tax, while the installations outside of Utah will be subjected to two sales/use taxes--one for the equipment's purchase/storage in Utah and a second for its storage and use outside of Utah.

A state may satisfy the second and third prong of the Complete Auto Transit test by providing a credit for taxes paid in another state. D. H. Holmes Co. v. McNamara, 486 U.S. 24 (1988). The credit provisions in Utah's statute for taxes paid to other states protects Utah's taxing scheme under the Complete Auto Transit tests. However, the Tax Commission's interpretation of Utah's credit provisions would destroy their very purpose. As

demonstrated by the Chicago Bridge & Iron Co. and Sinclair Pipeline Co. cases, the risk of multiple taxation is not just hypothetical, if the statutory credit is contingent upon whether the Tax Commission finds the other state's law was "properly" applied or that one state's taxing rights take "precedence" over the other state's rights. The Sales and Use Tax Act, as applied by the Tax Commission, will not meet the Complete Auto Transit tests.

D. ISSUE 4.

THE TAX COMMISSION ERRED IN AFFIRMING A TEN PERCENT NEGLIGENCE PENALTY ON THE ENTIRE AUDIT DEFICIENCY.

The Auditing Division assessed a 10% negligence penalty against Broadcast. The Auditing Division claims Broadcast was negligent because it "did not institute reasonable controls to ensure proper collection or accrual of tax," and, in addition, "did not properly train employees handling taxes by providing them with current laws and rules." Statutory Notice, R. 562.

The Tax Commission's decision sustains the penalty on different grounds. It states:

> In view of Broadcasts inattention to its sales and use tax liability during the initial portion of the audit period, its adoption of inconsistent positions with respect to its Utah and out-of-state installations, and its neglect of the sales and use liability on the Osmond transaction, . . . [the penalty] is appropriate.

Final Decision, R. 24.

The purported justifications for assessing a negligence penalty against Broadcast are specious. The Tax Commission's Finding are inconsistent with the audit report assertions. More importantly, they make no attempt whatever to justify the negligence penalty under the standard of Utah Code Ann. § 69-1-401(3)(a). They seem motivated by vindictiveness, not by facts. Each of these conclusions are demonstrated below.

First, it is obvious from a review of the audit report, transcript and depositions, that the justification for imposing a negligence penalty on Broadcast is inconsistent and unfair. The audit report asserts that Broadcast did not institute reasonable controls and policies for collection and payment of sales/use taxes. However, Reese Davis testified that in 1988 he developed a sales/use tax policy and wrote to every state and jurisdiction in which Broadcast did business, offering to pay whatever tax may have been due and requesting an abatement of penalty and interest. Hearing Transcript at 121-122. Mr. Davis also hired Vertex Tax Advisors, Inc. to complete a review of Broadcast's sales/use tax policy and instruct Broadcast as to what it was required to do to comply with the sales/use tax laws in the states in which it did business. Vertex's conclusion was "BI is in total compliance and has stood the test of any state audit that has been conducted." Petitioner's Hearing Exhibit P-22, p. 1. Even assuming Vertex was wrong, it should be obvious to any fair-minded person that from

1988 on, Broadcast, by writing every jurisdiction and hiring tax consultants, made a good faith effort to comply with the sales/use tax laws in the jurisdictions in which it did business. The audit period was from January 1, 1987 through September 30, 1990. The audit report's accusation that Broadcast had no reasonable controls or training during the audit period was simply false. It had sales/use tax policies and controls starting in 1988. Likewise, it is an abuse to impose a penalty for 1988 through 1990 on the basis of Broadcast's lack of a sales/use tax policy and training program in 1985 and 1986, years outside the audit period.

Second, it is particularly egregious for the Tax Commission to uphold the penalty because of Broadcast's alleged "inconsistent positions with respect to its Utah and out-of-state installations." The Tax Commission lacks jurisdiction and competency to interpret another state's tax laws or decide another state's tax liabilities. The Administrative Law Judge so ruled in the hearing. Hearing Transcript at 363. Yet the Tax Commission implicitly must have determined the basis of Broadcast's out-of-state tax liabilities in order to conclude that Broadcast has been "inconsistent." Furthermore, it is not inconsistent for "Broadcast to consider itself to be the seller of the Utah equipment" and pay tax on the price of the equipment, rather than on the "entire amount of its service fees." As discussed under Issue 1, the definition of "sale" includes a "lease or contract." The Tax

Commission's statement would only necessarily be true under a lease calling for a stream of payments. It ignores the grant of rights under a "contract" which may not also be a lease requiring a stream of payments for the equipment.

Third, as described under Issue 5, Broadcast provided its facilities to Osmond. There is no basis to conclude that Broadcast "sold" tangible personal property to Osmond.

Fourth, the Tax Commission's zeal to tax Broadcast and impose a penalty runs afoul of recognized case law. Negligence is defined, "The omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would do, or the doing of something which a reasonable and prudent man would not do." Black's Law Dictionary "Negligence" (1991 ed.) Picking up on this theme, state case law is to the effect that a taxpayer is not negligent if it had a reasonable or "good faith" basis for its position. Chicago Bridge & Iron Co. v. State Tax Commission, infra. See also Phillips Mercantile Co. v. New Mexico Taxation and Revenue Dep't, 786 P.2d 1221, 1225 (N.M. Ct. App. 1990) (maintained "a good faith doubt concerning the taxability of its transactions."); C & D Trailer Sales v. Taxation & Revenue Dep't, 604 P.2d 835, 837-838 (N.M. Ct. App. 1979) (nonpayment results from "diligent protest . . . based on informed consultation and advice."); Tummuru Trades, Inc. v.

Utah State Tax Commission, 802 P.2d 715 (Utah 1991) (a "negligence" penalty lies within the sound discretion of the Tax Commission.)

The matter at hand has been hotly contested by both parties. It certainly cannot be reasonably asserted that Broadcast's transactions with its subscribers, in light of the statutory language and the uncontroverted facts, is unreasonable or without merit. In fact, Broadcast's position has considerably more merit than the Tax Commission's position. Accordingly, within the good faith standard articulated by the Utah Supreme Court in Chicago Bridge & Iron Co., supra, the penalty is inappropriate.

E. ISSUE 5.

THE TAX COMMISSION ERRED IN FINDING THAT BROADCAST SOLD TANGIBLE PERSONAL PROPERTY TO OSMOND RATHER THAN A NONTAXABLE SERVICE.

The Tax Commission's ruling that Broadcast sold tangible personal property to Osmond underscores its blatant disregard for the testimony presented. At the formal hearing, Mr. Benson testified that the alleged "sale" from Broadcast to Osmond actually related to the use by Osmond of Broadcast's studio to develop a "master tape" which Osmond then duplicated and apparently resold to its customers. Mr. Benson's testimony was:

> Yes. Merrill came to us and requested that he be able to use our recording facility to make master tapes of certain recording material, which we agreed to let him do for a fee. He came and produced those, what's called a master tape, and then he took the master tape and had it duplicated some place else, I don't

> know where, and then he, through another distributor, were selling master tapes of these recordings to convenience stores.
>
> With regard to the exemption certificate, we never got an exemption certificate because we were only providing recording services and a recording facility to Merrill, and didn't think we needed it. Subsequent to the audit, the Tax Commission took issue with that and said we were, in fact, selling personal property, which we still don't think we were doing. (Emphasis added)

Hearing Transcript at 220.

No evidence was presented at the hearing to contradict Mr. Benson's testimony. The nature and character of the claimed transaction was not otherwise explored at the hearing. Notwithstanding this testimony, the Tax Commission concludes: "The subsequent sale of the master tape to Osmond was, therefore, a sale of tangible personal property subject to a sales and use tax under Utah Code Ann. § 59-12-103(1)." Final Decision, R.22. This statement is blatantly false. Mr. Benson testified that Osmond used their recording facilities to make a master tape of certain recordings. Osmond then took the master tape elsewhere for duplication and sale. There is no evidence that Broadcast provided a blank tape to Osmond. Particularly, there is no evidence of any "subsequent sale of a master tape to Osmond" as stated by the Tax Commission in its decision. The testimony is to the opposite. The claimed transaction is a complete fabrication on the part of the

auditors and sustained by the Tax Commission. Clearly, this is an erroneous finding and must be reversed.

F. ISSUE 6.

THE TAX COMMISSION ERRED IN FAILING TO HONOR ITS LONG-STANDING EXEMPTION FROM SALES TAXES FOR SALE OF "CUSTOM" AS DISTINGUISHED FROM "CANNED" SOFTWARE.

Initially the Auditing Division viewed the "Osmond" issue as whether Broadcast's sale to Osmond was of "custom" or "canned" software, the former being subject to sales tax and the latter not. Ms. Andersen justified the assessment against Broadcast of its alleged sales to Osmond under Rule R865-19-92S, which defines "custom" and "canned" software and describes the cases in which tax is imposed on "canned" software. Deposition of Anna K. Anderson at 29.

Assuming that Broadcast's sale to Osmond was for "software," there was no statute, no rule and thus no justifiable basis upon which to impose such a tax without promulgating a rule. This is especially true given the Auditing Division's policy at the time of exempting software sales from taxation. See Exhibit 4 of Anna Andersen Deposition. See also Williams v. Public Service Commission, 720 P.2d 773 (Utah 1986). Ms. Andersen claimed her letter to IBM dated January 13, 1989 only applied to "custom" software, but the letter (Exhibit 4) does not say that. Neither does it imply the distinction she now claims for it since IBM was

selling "licensed programs" (presumably "canned software") tax free per Anna Andersen's directive of January 13, 1989. Rule R865-19-92S was not adopted until 1991.

If it is assumed the Auditing Division can impose a tax without statutory authority or by retroactive application of Rule R865-19-92S, Broadcast's sale is still not taxable (as distinguished from an exemption from taxation). First, Broadcast's total involvement was allowing Osmond to use its studio. See discussion under Issue 5. Second, under Rule R865-19-92S, the "master tape" Broadcast sold to Osmond was "custom software" in that it was a "program or set of programs designed and written for a particular user." The tape was unique to and for Merrill Osmond. The tape did not therefore constitute the sale of tangible personal property and was not taxable.

Even assuming that the tape was "canned software," however, it was a "sale for resale" and not taxable. The Auditing Division's Answer, which presumes the sale was for tangible personal property, states that such sales are "subject to taxation unless Petitioner can produce a valid exemption certificate issued to it by the purchaser which identifies these items as being purchased for resale." Answer to Amended Petition at 5. At the formal hearing an exemption certificate (Petitioner's Exhibit P-26) given by Osmond to Broadcast and signed by Merrill Osmond was entered into evidence. (Hearing Transcript at 221.) The Auditing

Division objects to this Exemption Certificate because "We can't just accept a certificate signed by anyone without a resale number." (Hearing Transcript at 333.) This excuse for not honoring the exemption certificate appears mean spirited and contravenes Rule R865-19-23S, which expressly includes "other similar acceptable evidence to support the vendor's claim that a sale is for resale or otherwise exempt." In other words, the Sales and Use Tax Act and Rule R86S-19-23S were intended to except from taxation those sales in which the vendor can produce bona fide evidence that the sale was for resale. Dishonoring an exemption certificate because it does not have a "resale number" ignores the statute and the rule. The Auditing Division's justification for refusing to exempt the Broadcast-Osmond transaction from taxation, even though it knows Broadcast's sale to Osmond was for resale, is frivolous.

VII. CONCLUSION

As the Tax Commission stated in its decision, the issue is whether Broadcast purchased satellite receiving equipment from Utah vendors and "sold" that equipment to its subscribers. If so, the initial purchase was a nontaxable "sale for resale." Under the Sales and Use Tax Act, "sale" is defined broadly to include many arrangements or transactions which are not sales under common and commercial definitions of that term. Specifically, the definition of the word "sale" for purposes of the Sales and Use Tax Act,

includes the grant of "possession, use or operation" of tangible personal property which "would be taxable if an outright sale were made." The uncontroverted evidence was that through the service agreements and the course of conduct between the parties, Broadcast granted possession of its equipment to its subscribers by installing the equipment at its subscribers' places of business and leaving the equipment under the subscribers' custody and control. After installation, the subscribers operated the equipment by selecting the type of music to receive, making arrangements for its in-store advertising with their product suppliers, sending and receiving electronic mail and video conferencing, and utilizing debit or credit transactions and payments. The subscribers operated and used the equipment through turning the equipment on and off, controlling the volume, providing simple maintenance, loading the printers with paper, checking the status of the equipment through the manipulation of buttons and other similar activities. The rights, actions and activities of the subscribers clearly include the possession, operation or use of the equipment under any normally accepted definitions of those terms, including the statutory definitions provided in the Sales and Use Tax Act. The Tax Commission's contrary decision is manifestly unfair, illogical, unlawful, and erroneous and must be reversed.

If notwithstanding Broadcast's arguments under Issue 1, the Court upholds the ruling that Broadcast's initial purchases

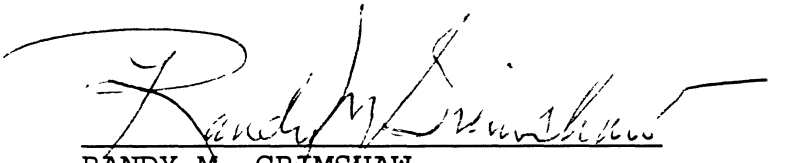
not "for resale" then Broadcast is entitled under two independent statutory provisions -- Utah Code Ann. §§ 59-1-801 and 59-12-104(28) -- to receive a credit for the sales or use taxes it has paid to another state or jurisdiction on the same property. The explicit statutory language unambiguously provides for the credit. Any other interpretation of the statute requires reading conditions and qualifications into the statutory language which the legislature did not enact. In addition, failure to grant the credit relief subjects Broadcast to double taxation in violation of the Commerce Clause of the United States Constitution. The Tax Commission's decision to the contrary is unlawful and erroneous and must be reversed.

As to upholding the imposition of the penalty, the Tax Commission's articulated reasons do not square with the evidence presented. Further, the taxpayer's theory of the case is based on a literal reading of the definition of the word "sale" in the Sales and Use Tax Act and as previously interpreted in the Young Electric Sign Company v. Utah State Tax Commission, supra. Broadcast's position is asserted in "good faith" as previously defined by the courts. The Tax Commission's decision upholding the penalty must be reversed.

The imposition of tax on the "Osmond" transaction is directly contrary to the specific testimony presented. It relies

solely on the statutory notice prepared by the auditors without any basis. The finding must be reversed.

RESPECTFULLY SUBMITTED this 8th day of October, 1993.



RANDY M. GRIMSHAW
MAXWELL A. MILLER
of and for
PARSONS BEHLE & LATIMER
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of October, 1993, I caused to be mailed, first class, postage prepaid, a true and correct copy of the foregoing **BRIEF OF PETITIONER** to:

Utah State Attorney General
c/o Clark L. Snelson
Assistant Attorney General
50 South Main Street, Suite 900
Salt Lake City, Utah 84144

Barbara McFarland

Appendices

Appendix A

BEFORE THE UTAH STATE TAX COMMISSION

BROADCAST INTERNATIONAL, INC., Petitioner,	)	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION
v.	)	
AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION, Respondent.	)	Appeal No. 91-1402
	)	Account No. D52955

STATEMENT OF CASE

This matter came before the Utah State Tax Commission for a formal hearing on September 9 and 10, 1992. Commissioners Joe Pacheco and S. Blaine Willes of the Commission and Alan Hennebold, Administrative Law Judge, heard the matter on behalf of the Commission. Maxwell A. Miller and Randy M. Grimshaw, of Parsons Behle & Latimer, represented Petitioner. Clark L. Snelson, Assistant Utah Attorney General, represented Respondent.

Based upon the evidence presented at the hearing, the Tax Commission hereby makes its:

FINDINGS OF FACT

1. The tax in question is sales and use tax.

2. The period in question is January 1987 through September 1990.

3. On August 1, 1991, the Audit Division assessed Broadcast with additional sales and use tax in the amount of $241,809.04, a 10% negligence penalty in the amount of

$24,180.92 and interest accrued at the statutory rate through August 31, 1991 in the amount of $47,456.09. Broadcast filed a timely appeal of the foregoing assessment with the Commission.

4. Broadcast is a Utah corporation with its principal place of business in Midvale, Utah. It began doing business in 1985.

5. Broadcast provides the services of a private satellite network to large retail businesses ("subscribers" hereafter) such as American Stores, Fleming Foods and Safeway. Broadcast's services can include background music, in-store advertising, electronic mail, video conferencing, stock and commodity quotes, check verification, and credit card services.

6. Each subscriber determines the services it will receive from Broadcast. It also determines the contents of such services. For example, each subscriber selects the type of background music it will receive, makes arrangements for its own in-store advertising directly with advertisers, and establishes the time and content of video conferences. The services selected by subscribers are delivered over Broadcast's satellite network, according to the subscriber's instructions.

7. Broadcast's services are provided pursuant to "service agreements" negotiated between Broadcast and each subscriber. These contracts specify the types of service each subscriber will buy from Broadcast and the price of such services. Each contract requires Broadcast to supply all the equipment necessary to provide the agreed-upon services.

8. Broadcast has over 4,000 installations at subscriber locations throughout the United States.

9. Broadcast provides its services to subscribers by means of a satellite dish and mount, low noise amplifier, connecting cable, printer and receiver at each location. Demodulators and "uplink" equipment are also sometimes used. Uplink equipment allows the subscriber to send, as well as receive, information over Broadcast's satellite network. If a particular subscriber already has some of the equipment necessary to receive Petitioner's services, such equipment is incorporated into Broadcast's system.

10. Broadcast is bound by its service agreements to provide its services throughout the subscriber's hours of operation. Broadcast is also bound to furnish, install and maintain all equipment necessary for delivery of its services. Subscribers are contractually prohibited from moving the equipment, adding equipment, or altering the equipment. The service agreements specifically provide that equipment furnished by Broadcast remains Broadcast's property. Such equipment is labeled as Broadcast's property and also marked with Broadcast's inventory number.

11. Broadcast's employees or contractors install the necessary equipment at each subscriber's location. The satellite dish is typically mounted on the building's roof and attached to the building's framework. Cables connect the external equipment to the other components, which are usually located in a secure office.

12. Broadcast usually obtains any permits necessary for the installation of its equipment at the subscriber's location.

13. After Broadcast has installed its equipment, the subscriber determines how the system's volume should be set. Broadcast's employees make any necessary final adjustments to the equipment.

14. Satellite dishes are passive devices. Once aimed, they do not require further operation. Printers and receivers must be plugged in and turned on and printers must be loaded with paper. Receivers have volume controls and "status" buttons which can generate print-outs for trouble-shooting purposes.

15. Once Broadcast has installed the equipment, the subscriber communicates any desired changes in services to Broadcast, which then implements those changes from its location in Midvale. The subscribers cannot implement such changes in service themselves.

16. After installation is complete, Broadcast's service staff visits each installation as required to maintain the system in good working order, averaging 1.1 visits per year to each site.

17. Broadcast maintains a telephone based "trouble-shooting" unit to deal with system malfunctions. However, some subscribers instruct their employees to first contact the subscriber's own in-house "help desk" when problems arise. If the subscriber's help desk cannot resolve a problem through simple procedures, the subscriber calls Broadcast to correct the problem.

18. Subscribers are contractually bound to indemnify Broadcast for damage, destruction or loss to Broadcast's equipment while it is at the subscriber's location.

19. It is possible for Broadcast to physically move its equipment from one location to another. Such relocation has rarely been necessary due to the fact that subscribers have usually renewed their contracts with Broadcast.

20. Most of Broadcast's equipment was purchased from out of state vendors and shipped directly from the vendors to the installation site. In most cases, such sites were also out of state. Respondent has not assessed Utah sales or use tax on these out of state transactions.

21. Respondent has assessed sales and use tax on Broadcast's purchases of equipment from Utah vendors, primarily "Digistar" receivers purchased from CDI in Orem, Utah. CDI delivered the receivers to Broadcast's Midvale office. They were stored in Utah, then shipped to installation sites usually outside Utah.

22. At first, CDI charged sales tax on sales of receivers to Broadcast. Later, after Broadcast provided an exemption certificate stating that the receivers were being purchased for resale, CDI stopped charging sales tax.

23. From the time it began doing business in 1985 until 1988, Broadcast had no system for reporting and paying sales or use tax on acquisitions of equipment. Broadcast developed its system during 1988 and attempted to apply it retroactively to all prior equipment purchases. Under its system, Broadcast treats sales/use tax as due to the

jurisdiction in which the equipment is installed. Tax is calculated on the amount paid by Broadcast for the equipment.

24. The equipment in question is carried as an asset on Broadcast's financial records.

25. With respect to equipment used in Utah installations, Broadcast accrues use tax on such equipment as though it is the consumer. In other words, Broadcast pays tax to Utah based on its purchase price for the equipment, rather than on the payments it receives from subscribers.

26. In a transaction unrelated to Broadcast's purchase of equipment, Broadcast provided a blank master tape to Merrill Osmond Enterprises ("Osmond" hereafter) and allowed Osmond to use Broadcast's facilities to record the master tape. Osmond then duplicated the master tape at another location, producing tapes for retail distribution. Broadcast did not charge sales tax on the transaction, nor did it request an exemption certificate from Osmond.

27. After the Audit Division began its investigation of Broadcast's sales and use tax liability, Broadcast requested and obtained an exemption certificate from Osmond. However, the exemption certificate was not completed with an exemption number or a sales tax license number.

28. The Audit Division imposed a 10% negligence penalty in this matter on the grounds that Broadcast failed to organize and conduct its business with reasonable prudence so as to provide for proper payment of taxes and had improperly issuing a resale exemption certificate to CDI.

CONCLUSIONS OF LAW

Utah Code Ann. §59-12-103(1) levies a tax on the purchaser for the amount paid or charged for the following:

> (a) retail sales of tangible personal property made within the state; and
>
> . . .
>
> (l) tangible personal property stored, used, or consumed in this state.

Utah Code Ann. §59-12-104 exempts the following sales and uses from sales and use taxes:

> . . .
>
> (12) sales or use of property which the state is prohibited from taxing under the Constitution or laws of the United States or under the laws of this state;
>
> . . .
>
> (25) property stored in the state for resale;
>
> . . .
>
> (27) property purchased for resale in this state, in the regular course of business, either in its original form or as an ingredient or component part of a manufactured or compounded product; and
>
> (28) property upon which a sales or use tax was paid to some other state, or one of its subdivisions, except that the state shall be paid any difference between the tax paid and the tax imposed by this part.

"Retail sale" is defined by Utah Code Ann. §59-12-102(8)(a) as:

> . . . any sale within the state of tangible personal property or any other taxable item or service under Subsection 59-12-103(1), other than resale of such property, item, or service by a retailer or wholesaler to a user or consumer.

"Storage" is defined by Utah Code Ann. §59-12-102(12) as:

> any keeping or retention of tangible personal property or any other taxable item or service . . . in this state for any purpose except sale in the regular course of business.

"Sale", as material to this appeal, is defined by Utah Code Ann. §59-12-102(10)(e) as:

> any transaction under which right to possession, operation, or use of any article of tangible personal property is granted under a lease or contract and the transfer of possession would be taxable if an outright sale were made.

"Possession" is defined by Blacks Law Dictionary, Revised Fourth Edition, as:

> The detention and control, or the manual or ideal custody, of anything which may be the subject of property, for one's use and enjoyment, either as owner or as the proprietor of a qualified right in it, and either held personally or by another who exercises it in one's place and name. Act or state of possessing. That condition of facts under which one can exercise his power over a corporeal thing at his pleasure to the exclusion of all others.

"Use" is defined by Utah Code Ann. §59-12-102(14) as:

> (a) the exercise of any right or power over tangible personal property . . . incident to the ownership or the leasing of that property, item, or service.
> (b) Use does not include the sale, display, demonstration, or trial of that property in the regular course of business and held for resale.

"Operate" is defined by Webster's New Collegiate Dictionary as "to perform a function".

Part V of the Multistate Tax Compact, as adopted by Utah Code Ann. §59-1-801, provides as follows:

> Each purchaser liable for a use tax on tangible personal property shall be entitled to full credit for the combined amount or amounts of legally imposed sales or use tax paid by him with respect to the same property to another state and any subdivision thereof. . . .

The State of Utah has entered into similar reciprocal agreements with other jurisdictions not parties to the Multistate Compact.

Utah Administrative Rule R865-19-235(E) provides as follows:

> The burden of proving that a sale is for resale or otherwise exempt is upon the person who makes the sale. If any agent of the Tax Commission requests the vendor to produce a valid exemption certificate or other similar acceptable evidence to support the vendor's claim that a sale is for resale or otherwise exempt, and the vendor is unable to comply, the sale will be considered taxable and the tax shall be payable by the vendor.

Utah Code Ann. §59-12-110(5) provides as follows:

> If any part of the (sales tax) deficiency is due to negligence . . . there shall be added a penalty as provided in section 59-1-401 . . . to the amount of the deficiency . . . .

Utah Code Ann. §59-1-401(3) provides in material part:

> The penalty for underpayment of tax is as follows:
> (a) If the underpayment of tax is due to negligence, the penalty is 10% of the underpayment.

DECISION AND ORDER

Two separate fact situations underlie the assessment of sales and use tax in this matter. The first is Broadcast's purchase of equipment, primarily receivers, from Utah vendors. The second is Broadcast's sale of a "master recording tape" to Osmond. Broadcast's sales and use tax liability will be considered with respect to each of the foregoing fact situations. Thereafter, the Commission will consider the issue of penalties.

I. Equipment Purchased and Stored in Utah.

As noted in the preceeding findings of fact, Broadcast purchased some of its equipment from Utah vendors, primarily Digistar receivers from CDI in Orem. The equipment was then stored in Utah for a short time until it was transferred to out of state installation sites and connected to other equipment. The completed system enabled subscribers to receive Broadcast's services.

Any inquiry regarding assessment of sales and use tax begins with the question of whether the tax-imposing sections of Utah's Sales and Use Tax Act (Utah Code Ann. §59-12-101 et seq., "the Act" hereafter) reach the transactions at issue. The tax-imposing provisions of the Act must be liberally construed in favor of the taxpayer. Parsons Asphalt Products v. Utah State Tax Commission, 617 P.2d 397, 398 (Utah 1980).

Respondent raises §59-12-103(1)(a) of the Act as a basis for imposing sales and use tax on Broadcast's purchases of equipment from Utah vendors. Section 59-12-103(1)(a) provides as follows:

> There is levied a tax on the purchaser for the amount paid or charged for the following:
>
> (a) retail sales of tangible personal property made within the state.

Broadcast concedes it purchased the equipment in question from Utah vendors, but argues such purchases were not "retail sales" and therefore not subject to tax under §59-12-103(1)(a).

Section 59-12-102(8)(a) of the Act defines "retail sale" as follows:

> "Retail sale" means any sale within the state of tangible personal property or any other taxable item or service under Subsection 59-12-103(1), other than resale of such property, item, or service by a retailer or wholesaler to a user or consumer. (Emphasis added.)

Under the foregoing definition of "retail sale", Broadcast's purchases of equipment from Utah vendors are retail sales, and therefore subject to tax, unless the equipment was purchased for resale.

"Resale" is not defined by the Act. However, §59-12-102(10) defines "sale" as follows:

> "Sale" . . . includes:
> . . .
> (e) any transaction under which right to possession, operation, or use of any article of tangible personal property is granted under a lease or contract and such transfer of possession would be taxable if an outright sale were made.

Given the foregoing chain of statutory definitions, Broadcast's purchase of equipment from Utah vendors is not subject to sales and use tax under §59-12-103(1)(a) if purchased for resale. In the context of this case, Broadcast can only establish such a resale by showing that it granted its subscribers the right to possession, the right to operate, or the right to use such equipment.

With respect to the right of possession, Broadcast grants no such right to its subscribers. To the contrary, Broadcast grants only the right to receive various services. Equipment is installed by Broadcast only to allow receipt of Broadcast's service. The equipment remains completely under

Broadcast's authority. Broadcast can move, remove, or substitute equipment so long as the subscriber receives its services.

As to "right to operate", the term "operate" is not defined by the Act, and must therefore be applied according to its common meaning. "Operate" is defined by Webster's New Collegiate Dictionary as: "to perform a function". In the context of the contractual relationship between Broadcast and its subscribers, the subscribers are prohibited from tuning the receivers. They are also prohibited from connecting the equipment to any other equipment other than as installed by Broadcast. The equipment is completely dedicated to functioning as Broadcast's service delivery system. Under such circumstances, the subscriber's ability to turn the receiver on or off, push a button to obtain a status report, or increase the volume does not constitute the "right to operate" the equipment.

Finally, with respect to the subscriber's "right to use" the equipment, the Act defines "use" as the exercise of any right or power over tangible personal property. Once again, based upon Broadcast's service agreements with its subscribers as well as Broadcast's actual practice, the subscriber only has the "right" to receive services from Broadcast, but no right or power over the tangible property which delivers the services.

Based on the foregoing, the Commission finds that Broadcast does not convey to its subscribers the right to possess, operate or use the equipment in question. The

Commission therefore holds that Broadcast does not resell such equipment. Consequently, Broadcast's purchase of the equipment was not for "resale" so as to escape imposition of sales and use tax under §59-12-103(1)(a).

A second and independent basis for taxation with respect to the equipment is §59-12-103(1)(l), which imposes tax on the purchaser for the amount paid for tangible personal property "stored, used or consumed" in Utah. Clearly, Broadcast did not "use" or "consume" the equipment within this state and is subject to tax under §59-12-103(1)(l) only if it "stored" the equipment here.

The Act defines "storage" as "any keeping or retention of tangible personal property . . . in this state for any purpose except sale in the regular course of business." Under the undisputed facts of this case, Broadcast kept and retained the equipment in Utah, albeit a short period of time. Broadcast is therefore subject to tax under §59-12-103(1)(l) unless it falls within the exclusion contained therein for property stored in Utah for "sale in the regular course of business."

The application of the "resale" limitation has previously been discussed with respect to §59-12-103(1)(a). That discussion applies equally here. The Commission therefore concludes that Broadcast did not store the equipment in Utah for resale and that such equipment is subject to tax under §59-12-103(1)(l).

The Commission has concluded that Broadcast's equipment purchases in Utah are subject to tax under

§59-12-103(1)(a) and, alternatively, that the storage of such equipment in Utah is subject to tax under §59-12-103(1)(l). The Commission will next consider whether any of the Act's exemption provisions relieve Broadcast of such tax liability. Such exemption provisions are strictly construed against Broadcast. (Parsons Asphalt Products v. State Tax Commission, supra; Nucor Corp. v. State Tax Commission, 187 Ut. Adv. Rep. 17 (Utah 1992).)

Broadcast argues it is exempt from taxation under §59-12-104(12) because the transactions in question are in interstate commerce. However, Broadcast is a Utah corporation that purchased the equipment in Utah, took delivery in Utah, then stored the equipment in Utah. Such intrastate transactions are not within the exemption provided by §59-12-104(12).

Broadcast also argues it is exempt from taxation under §59-12-104(25), pertaining to property purchased in Utah for resale, or §59-12-104(27), pertaining to property stored in Utah for resale. The Commission has already dealt with the "resale" issue, concluding that the equipment in question was not purchased or stored in Utah for resale. For that reason, Broadcast's purchase and storage of the equipment does not qualify for exemption from sales and use tax under either §59-12-104(25) or §59-12-104(27).

Finally, Broadcast argues that under §59-12-104(28) of the Act, it is entitled to a credit for sales and use tax paid

on the equipment to other jurisdictions. Section 59-12-104(28) provides:

> The following sales and uses are exempt from the tax imposed by this chapter:
> . . .
> (28) property upon which a sales or use tax was paid to some other state, or one of its subdivisions, except that the state shall be paid any difference between the tax paid and the tax imposed by this part and Part 2, and adjustment is allowed if the tax paid was greater than the tax imposed by this part and Part 2;

Similarly, the Multistate Tax Compact, Article V, found in Utah Code Ann. §59-1-801 et seq, provides:

> Each purchaser liable for a use tax on tangible personal property shall be entitled to full credit for the combined amount or amounts of legally imposed sales or use taxes paid by him with respect to the same property to another state and any subdivision thereof. . . .

Broadcast contends that the foregoing statutes grant a credit to Broadcast, to be applied against its Utah sales and use tax liability, for sales and use taxes which were later paid to other jurisdictions. Broadcast also argues that failure to allow such credit would violate the Commerce Clause of the United States Constitution.

The Commission has previously concluded that Broadcast's purchases of CDI receivers from a Utah vendor were intrastate transactions. Therefore, Broadcast's Commerce Clause arguments are not well founded.

As to Broadcast's claim for credit for taxes paid to other jurisdictions, the Utah Supreme Court has addressed at least a portion of that issue in Chicago Bridge & Iron, 196 Utah Advance Reporter 18 (1992), holding that because the first

taxable event occurred in Utah, sales and use tax was payable to Utah. Chicago Bridge & Iron was decided by reference to the Multistate Compact. That logic is equally applicable with respect to other jurisdictions which are not members of the multistate compact, but which have entered into reciprocal agreements of the same nature with the State of Utah. The same result is also reached under §59-12-104(28) itself. Section 59-12-104(28) pertains only to sales or uses in Utah which involve property already taxed in other jurisdictions. If the the tax is first due in Utah, §59-12-104(28) does not apply. Otherwise, Utah's ability to collect sales and use tax would be subject to a taxpayer's decision to first pay tax elsewhere.

In the case now before the Commission, Broadcast purchased the equipment in Utah before shipping the equipment to other jurisdictions. The first taxable event therefore occurred in Utah and the tax on the transaction is payable to Utah. The Commission concludes that Broadcast may not claim a credit against its Utah tax liability for taxes paid to other jurisdictions.

In summary, then, the Commission concludes that Broadcast is liable under Utah's Sales and Use Tax Act for tax upon the amount paid by it for equipment either purchased from Utah vendors or stored in Utah. Broadcast is not entitled to credit against its Utah tax liability for sales or use taxes paid to other jurisdictions.

II. The Osmond Transaction

The second issue before the Commission relates to the imposition of tax on Broadcast's sale to Osmond of a master recording tape.

The Audit Division bases its assessment of tax on its conclusion that Broadcast produced and sold a master recording tape to Osmond, and that such a sale constitutes a retail sale of tangible personal property. For its part, Broadcast maintains that it merely leased its facilities to Osmond, and that Osmond then both produced the recording and provided the blank master tape itself. According to Broadcast, such a fact situation does not give rise to a sales or use tax.

The Commission has reviewed the record in this matter. Although the testimony at the hearing is inconclusive on the question of whether Broadcast provided the blank master tape, the pleadings serve to clarify such testimony. Based upon the entire record, the Commission has determined that Broadcast provided the blank tape and recording facilities from which the master tape was produced. The subsequent sale of the master tape to Osmond was, therefore, a sale of tangible personal property subject to sales and use tax under Utah Code Ann. §59-12-103(1).

Broadcast argues that it has obtained an exemption certificate from Osmond indicating that the master tape was purchased for resale, and that by virtue of the exemption certificate Broadcast had no obligation to collect the tax from Osmond. It is clear from the record that the exemption certificate's statement that the master tape was purchased for

resale is incorrect. The master tape was in fact consumed by Osmond, and not acquired for resale. Furthermore, Broadcast acknowledges that it did not obtain the exemption certificate at the time of transaction, but only after the Audit Division had commenced its audit. Furthermore, when the exemption certificate was finally received, it was improperly completed. Under such circumstances, Broadcast cannot claim to have relied on the exemption certificate. The Commission therefore concludes that Broadcast cannot rely upon an inaccurate, incomplete, after-the-fact exemption certificate to escape tax liability on the Osmond transaction.

III. PENALTY

The final issue is whether a negligence penalty is appropriate with respect to Broadcast's tax liability.

When Broadcast began doing business, it admittedly did so without any attention to Utah's Sales and Use Tax Act. Broadcast's inattention continued well into the audit period. Furthermore, Broadcast has taken inconsistent positions with respect to its in-state and out-of-state tax liabilities. In Utah, Broadcast has considered itself to be the consumer of the equipment in question, and has therefore paid sales tax on the purchase price of the equipment. If Broadcast had considered itself to be the seller of the Utah equipment, as it claims to be in other states, it would have been obligated to pay sales and use tax on the entire amount of its service fees received from Utah customers.

With respect to the Osmond transaction, Broadcast's sale of a master recording tape was clearly a sale of tangible personal property, subject to sales and use tax.

In view of Broadcast's inattention to its sales and use tax liability during the initial portion of the audit period, its adoption of inconsistent positions with respect to its Utah and out-of-state installations, and its neglect of sales and use liability on the Osmond transaction, the Commission concludes that the 10% negligence penalty imposed pursuant to Utah Code Ann. §§59-12-110(5) and 59-1-401 is appropriate.

IV. ORDER

In summary, the Commission concludes that Broadcast is liable for sales and use tax with respect to the amount paid by it for equipment purchased from Utah vendors or stored in Utah. Broadcast is not entitled to credit against its Utah sales and use tax liability for sales and use taxes paid to other jurisdictions. Broadcast is also liable for sales and use tax with respect to the Osmond transaction. Finally, the

10% negligence penalty imposed by the Audit Division is affirmed. It is so ordered.

DATED this 10th day of June, 1993.

BY ORDER OF THE UTAH STATE TAX COMMISSION.

R.H. Hansen
Chairman

Roger O. Tew
Commissioner

Joe B. Pacheco
Commissioner

S. Blaine Willes
Commissioner

NOTICE: You have twenty (20) days after the date of the final order to file a request for reconsideration or thirty (30) days after the date of final order to file in Supreme Court a petition for judicial review. Utah Code Ann. §§63-46b-13(1), 63-46b-14(2)(a).

AH/sj/3773w

STATE TAX COMMISSION SEAL STATE OF UTAH

MAILING CERTIFICATE

I hereby certify that I mailed a copy of the foregoing Decision to the following:

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DATED this 10th day of June, 1993.

Sara Jenson
Secretary

Appendix B

APPENDIX B

SELECTED EXCERPTS OF THE HEARING TRANSCRIPT

Section 1. Possession of Equipment

Hearing Transcript p. 41, line 16 through p. 43, line 20. (Testimony of Dwight Egan, President of Broadcast)

Q. [By Mr. Grimshaw]. Thank you. This is a paragraph that seems to have created some particular misunderstandings between the Auditing Division and Broadcast. It seems to say that in order to receive the services that Broadcast provides you will furnish, and I believe the operative verbs are "furnish, install and keep in good operating condition" all equipment necessary for the subscriber to receive the satellite transmissions. Is that a fair reading of what that says?

A. [By Mr. Egan]. Yes. The company provides that equipment so that they can receive those services.

Q. The company shall furnish, install and keep. Did you intend, Mr. Egan, to transfers possession of this equipment to the subscriber by the use of those operative verbs?

A. Inasmuch as the subscriber could not receive any of our services without having possession of equipment, having it installed on their roof, yes, we intended to transfer possession to the subscriber.

. . .

Q. What, Mr. Egan, would you define the word possession as you understand it?

A. I understand possession to mean that in this case the subscriber would have the equipment on their premises. In this case, the equipment is mounted permanently onto their roof. It involves drilling a hole into their roof, attaching it to the membranes of the building. It includes often times welding, reflashing the roof to maintain the roof warranty, cabling from that point down to the manager's office where another fixture is attached to the wall to house the receiver, and attendant other

equipment which may include a video recorder or a television set.

By possession I mean that they have it there on their premises within their control throughout the term of the contract. In fact, if we were to take the equipment out we would be in breach of contract, any they could not receive the services. They have to have the equipment to receive the services. We have to provide the equipment, furnish it, install it, keep it in good operating condition in order to comply with our contractual terms.

Q. So in your opinion then using that, I think, general definition of the word possession the you just provided, in your opinion the subscribers have possession of this equipment?

A. They have possession of our equipment in every sense that I know of what possession would mean. They certainly have possession of our equipment in the same way that a cable subscriber has possession of a Showtime box or a Digital Music Express box in their home. They have it. They may connect it to other peripheral pieces of equipment, but they have it there in their home. They have it there in their store. We may never see it again. We hope to never see it again because we want them to continue to have a contractual relationship with us.

Hearing Transcript p. 81 line 25 through p. 82 line 23 (Testimony of Dwight Egan, President of Broadcast)

Q: [By Mr. Grimshaw] Let's follow Mr. Snelson's line of questioning a little bit. If possession is not granted by the contract, as he would have us believe, to the subscribers, how would you suggest the subscribers receive the equipment?

A: [By Mr. Egan] They would have no way -- receive the services, you mean?

Q: No. Receive the equipment. I'm talking about the equipment. There are several ways, I guess, to have possession of equipment. One would be you grant them rights to have possession. Another way they steal the equipment. They take it by extortion. They get it by conversion. Are you in any way suggesting that the subscribers have rights and have possession of this

equipment in any way other than through your grant of rights?

A: No. They have a grant of right through this contract. They sign a contract that enables me to go to the bank to get money to buy dishes to put on their roofs, and that is the context in which they have possession.

If our contract said we are going to grant you possession, operation and use, I don't know that that would change things here. The characterization of what we have done is very simple. We provide services and it requires satellite receiving equipment to receive the services period. They cannot get them any other way from our company.

Hearing Transcript p. 226 line 4 through line 23 (Testimony of Reed L. Benson, General Counsel of Broadcast)

Q: [By Mr. Miller] Did these license agreements have a provision by which the subscriber or by which Broadcast International was to furnish and install equipment at the subscriber's location?

A: [By Mr. Benson] Yes.

Q: Do all the agreements have such a provision?

A: Yes.

Q: What was your intent in drafting that provision?

A: The intent was to fulfill the intent of the parties. That is, that we would deliver a service to them via satellite, and the only way we could do that was to install our satellite receiving equipment at each of the locations that were to receive it.

Q: Are you familiar with the course of conduct of the parties after these agreements have been signed?

A: Yes.

Q: Pursuant to the course of conduct after the agreements have been signed, have the subscribers obtained possession of the equipment?

A: Yes.

Hearing Transcript p. 91, line 25 through p. 94, line 17. (Testimony of John Lasater, Manager of Store Systems for SaveMart Supermarkets)

Q. [By Mr. Grimshaw]. I'd like to focus on the particular equipment just for a minute before we get into detail as to what those services are and how they are performed. What equipment is installed in each of your stages? And by equipment I'm talking about the satellite equipment that we have been talking about here today.

A. [By Mr. Lasater]. Each store has a dish on the roof. Each store has a Personal Earth Station. It has a receiver, and it also has the Okidata printer. It's the one that is used for the E mail.

Q. Does Broadcast or Broadcast personnel have access to the equipment that's installed in your stores?

A. The only time they have access to the equipment is when they are called by our help desk when it would be an equipment failure. Our help desk is the first line of communication. None of the stores are allowed to call Broadcast by themselves. They route the call through our help desk. We do first line of support to try to solve the problem. If we feel that it is an equipment failure, then we call Broadcast International and they dispatch.

Q. When you say you call help desk, help me understand. Suppose the music stops playing, what would happen?

A. The music stops playing, they call our help desk, and the first thing we ask them, we ask them what is on the receiver, do they have a red signal light on, which means that the signal is weak or they're having a problem. We would probably have them reset, and we would also take a status report from them first and review that with them, have them reset the system. It comes back in about three to five minutes, and generally that solves the problem. If the problem is more extensive, then we would place the call.

Q. So internally you try to find out what the particular problem is. Only if you're unsuccessful internally, would you then contact Broadcast; is that correct?

A. That's correct.

Q. That raises a question I'd like to ask. Where, in general, I know that each store may be a little different, but where in general inside a store will this equipment be installed?

A. Ninety-five percent of the stores it's installed in a secured manager's office. In fact, to my knowledge, all equipment is in a manger's office. Sometimes that also is a bookkeeper's office because the location and the size of the store is very small, but it's all in a secured part of the building.

Q. Did you decide, is it the SaveMart decision to have it in a secured place in the manager's office?

A. Yes. We designate where it will be placed.

Q. Why do you want it in some kind of secure place?

A. Because we have problems with employees, night crew people that want to play different types of music. They tend to interfere with the system, which would mean the next day, of course, we are going to have to do first line of support and maybe call out service for damages done.

Hearing Transcript p. 105, line 18 through p. 106, line 8. (Testimony of John Lasater, Manager of Store Systems for SaveMart Supermarkets)

Q. [By Mr. Grimshaw]. You've been sitting here this morning, Mr. Lasater, and I think you probably, from the testimony that has been given, are generally aware that we are arguing about some fairly common terms, possession, use, and operation. Those are terms that are used in Utah statute. They may not have any relevance in California where you're from, but they are terms that have relevance in Utah statute. Could you give us, and I'm not asking for any kind of a lawyer definition, but could you just give us a general definition of the word possession, what you view the word possession to mean.

A. [By Mr. Lasater]. SaveMart views the word possession as the fact that we have the equipment secured at our store locations. We physically have the equipment.

Q. And I take it it's your testimony that from SaveMart's perspective you have possession of this equipment?

A. We have possession of all the equipment, yes.

Section 2. Operation of Equipment

Hearing Transcript p. 56, line 18 through p. 58, line 23. (Testimony of Dwight Egan, President of Broadcast)

Q. [By Mr. Grimshaw]. Let's focus on the word operate for a minute. Again, the Auditing Division has made certain claims that the subscribers do not operate this equipment. Would you describe from your point of view how the subscribers operate this equipment?

A. [By Mr. Egan]. Well, there are various pieces of equipment at issue here. Certain pieces of equipment certainly have more hands on operation than others. A satellite receiver, of course, to some degree is a passive device which receives signals and passes them on. A computer printer that they receive electronic mail on is something that has to have paper loaded. We do not go out and put paper in somebody's printer. They have to load their own paper. They have to buy their own paper. They have to put it in. They have to push the button that says I want to set the top. They have to push the button that says they are ready to go, and they have to make sure that it's at all times connected from a cable standpoint.

They certainly use a television set or VCR as they watch and participate in a video conference. We are not there to watch the video conference. They conduct this on their own. The only involvement that Broadcast International would have on that type of broadcast is to authorize receivers to receive it. Similar to again somebody like Showtime authorizing a box to receive their signal having been subscribed to by the end user.

So they operate it in having to set paper, tear paper off, push a button to check status on the receiver, make sure it's plugged in, make sure it's connected properly to their other devices in the store that it may be connected to, other computer devices or amplifiers or other things that they may own. It varies from piece of

equipment to piece of equipment as to how much they actually manhandle it. But indeed in all cases they manhandle it to some degree.

When a person calls our service center from 3,000 miles away, they have to stand there in front of that equipment and operate it, in order to tell us even what's wrong with it, in order for us to decide whether or not we are going to send a service repairman out at considerable cost to the company or whether we can have them fix it on the phone. We try to fix as many as possible on the phone by having them go through a series of diagnostic tests where they push a button to give us the status, tell us what the status is. We may send another group of codes to reprogram the E prompts and so on. But in every sense of the word, an employee of the store, generally its manager, is standing in front of it operating it, pushing buttons, making sure it's connected and so on.

Q. Does Broadcast or Broadcast employees have access to this equipment once it's installed?

A. Broadcast would only have access to the equipment to render maintenance on the equipment in the case where a store employee or manager, in most cases, is not able to satisfactorily get the equipment in working order. We indeed send out repairmen to repair a receiver, or in some cases, to send it back to be repaired to a warehouse and so on. But we try to do that as little as possible because that is a great expense to the company.

Hearing Transcript p. 106, line 22 through p. 107, line 10. (Testimony of John Lasater, Manager of Store Systems for SaveMart Supermarkets)

Q. [By Mr. Grimshaw]. Likewise the word "operate," could you give us a general definition of that term.

A. [By Mr. Lasater]. I would give the definition that we operate the equipment in the manner in which it has been designed. We use the equipment. It operates for us. That's a little difficult for me. I mean there is really nothing to operating it. You know, once it's set up, it actually just takes care of itself.

Q. Except for the functions that we have described, like turning off and on the equipment, fixing the printer, making sure the right select modes are chosen.

A. That's correct. In these cases, it would be, I guess, considered an operation, and we do operate. Or when we run the E mail, I would think of that as being an operation because we actually are sending data.

Section 3. Use of Equipment

Hearing Transcript p. 55, line 15 through p. 56, line 17. (Testimony of Dwight Egan, President of Broadcast)

Q. [By Mr. Grimshaw]. The Auditing Division, I think, has made some claims, Mr. Egan, that the subscribers do not possess the equipment that I think we have discussed that previously. They have also made some claims that the subscribers do not use the equipment. Would you tell us how the subscribers use the equipment, what the subscribers actually do with this equipment?

A. [By Mr. Egan]. Well, I mean, this is basically like asking who uses the television set in a home. Does KSL television use it because they happen to broadcast signals to it, or does the individual participant in the home or the individual subscriber to Showtime or Digital Music Express. Who uses it, who has the benefits of it. Obviously Broadcast doesn't have the benefits of the background music. We are here in Utah, not in California or Washington D.C.

So the customers and the employees of the store are listening to the background music and enjoying its benefits. They are selling the ads. They are airing the ads to influence customers' decisions at the point of sale. They are sending electronic mail, and they are certainly conducting and airing and watching their own video conferences.

To me, I don't know how we would construe the broadcast as having -- using it in the beneficial sense of receiving the services that we are providing to those customers. It's clearly, in my view, the customers are using that equipment every bit as much as a customer of

TCI Cable is watching or listening to a programming delivered from a cable or from a local broadcast station.

Hearing Transcript p. 106, line 7 through line 20. (Testimony of John Lasater.)

Q. [By Mr. Grimshaw]. Would you give me a general definition of the word "use" in the context of equipment being used.

A. [By Mr. Lasater]. Equipment is at the store locations for our use. It is to handle our daily needs, whether it be for payment, music, E mail or whatever. It is there for our specific needs, and we are the ones that use it at our discretion.

Q. From SaveMart's perspective, I take it that you believe you use this equipment?

A. Yes, we do use this equipment.

Q. You use it daily?

A. We use it daily.

Q. Hourly?

A. Yes.

Appendix C

APPENDIX C

TEXT OF CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

1. United States Constitution, Article I, Section 8, Clause 3

> [3.] To regulate commerce with foreign nations, and among the several States, and with the Indian Tribes;

2. Utah Code Ann. § 59-12-103(1)(a) (1987)

> (1) There is levied a tax on the purchaser for the amount paid or charged for the following:
>
> (a) retail sales of tangible personal property made within the state;

3. Utah Code Ann. § 59-12-103(1)(l) (1987)

> (1) There is levied a tax on the purchaser for the amount paid or charged for the following:
>
> . . .
>
> (l) tangible personal property stored, used, or consumed in this state.

4. Utah Code Ann. § 59-12-102(8)(a) (1987)

> As used in this chapter:
>
> . . .
>
> (8)(a) "Retail sale" means any sale within the state of tangible personal property or any other taxable item or service under Subsection 59-12-103(l), other than resale of such property, item, or service by a retailer or wholesaler to a user or consumer.

5. Utah Code Ann. § 59-12-102(10) (1987)

> As used in this chapter:
>
> . . .
>
> (10) "Sale" means any transfer of title, exchange, or barter, conditional or otherwise in any manner,

of tangible personal property or any other taxable item or service under Subsection 59-12-103(1), for a consideration. It includes:

(a) installment and credit sales;

(b) any closed transaction constituting a sale;

(c) any sale of electrical energy, gas, services, or entertainment taxable under this chapter;

(d) any transaction if the possession of property is transferred but the seller retains the title as security for the payment of the price; and

(e) any transaction under which right to possession, operation, or use of any article of tangible personal property is granted under a lease or contract and the transfer of possession would be taxable if an outright sale were made.

6. Utah Code Ann. § 59-12-102(12) (1987)

(12) "Storage" means any keeping or retention of tangible personal property or any other taxable item or service under Subsection 59-12-103(1), in this state for any purpose except sale in the regular course of business.

7. Utah Code Ann. § 59-12-102(14)(a)

(14)(a) "Use" means the exercise of any right or power over tangible personal property under Subsection 59-12-103(1), incident to the ownership or the leasing of that property, item, or service.

8. Utah Code Ann. § 59-12-104(28) (1987)

The following sales and uses are exempt from the taxes imposed by this chapter:

. . .

(28) property upon which a sales or use tax was paid to some other state, or one of its subdivisions, except that the state shall be paid any difference between the tax paid and the tax imposed by this part and Part 2, and no adjustment is allowed if the tax paid was greater than the tax imposed by this part and Part 2;

9. Utah Code Ann. § 59-1-801 (1987)

ARTICLE V. ELEMENTS OF SALES AND USE TAX LAWS
Tax Credit

1. Each purchaser liable for a use tax on tangible personal property shall be entitled to full credit for the combined amount or amounts of legally imposed sales or use taxes paid by him with respect to the same property to another state and any subdivision thereof. The credit shall be applied first against the amount of any use tax due the state, and any unused portion of the credit shall then be applied against the amount of any use tax due a subdivision. Exemption Certificates, Vendors May Rely

2. Whenever a vendor receives and accepts in good faith from a purchaser a resale or other exemption certificate or other written evidence of exemption authorized by the appropriate state or subdivision taxing authority, the vendor shall be relieved of liability for a sales or use tax with respect to the transaction.

10. Utah Code Ann. § 59-1-610(1)(b) (1993)

(1) When reviewing formal adjudicative proceedings commenced before the commission, the Court of Appeals or Supreme Court shall:

(b) grant the commission no deference concerning its conclusions of law, applying a correction of error standard, unless there is an explicit grant of

discretion contained in a statute at issue before the appellate court.

11. Utah Code Ann. § 63-46b-16(1) (1987)

> (1) As provided by statute, the Supreme Court or the Court of Appeals has jurisdiction to review all final agency action resulting from formal adjudicative proceedings.

12. Utah Code Ann. § 78-2-2(4) (1992)

> (4) The Supreme Court may transfer to the Court of Appeals any of the matters over which the Supreme Court has original appellate jurisdiction, except: . . .

13. Utah Code Ann. § 78-2a-3(2)(k) (1992)

> (2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:
>
> . . .
>
> (k) cases transferred to the Court of Appeals from the Supreme Court.

14. Rule R865-19-23S

A. Taxpayers selling tangible personal property or services to exempt customers are required to keep records verifying the nontaxable status of such sales. Records shall include:

1. sales invoices showing the name and identity of the customer, and

2. exemption certificates for exempt sales of tangible personal property or services if the exemption category is shown on the exemption certificate forms or if the sale is to a government agency, and the total sale is $100 or less.

B. The Tax Commission will furnish samples of acceptable exemption certificate forms on request. Stock quantities are not furnished, but taxpayers may reproduce samples as needed in whole or in part.

C. Exemption certificates are not required for sales to qualified government agencies (federal, state, counties, and cities--including schools), but the vendor must keep a purchase order or other acceptable evidence of exemption, such as a copy of a check or voucher.

D. If a purchaser is unable to segregate tangible personal property or services which he purchases for resale from tangible personal property or services which he purchases for his own consumption, everything should be purchased tax-free. He must then report and pay the tax on the cost of goods or services purchased tax-free for resale but which are used or consumed.

E. The burden of proving that a sale is for resale or otherwise exempt is upon the person who makes the sale. If any agent of the Tax Commission requests the vendor to produce a valid exemption certificate or other similar acceptable evidence to support the vendor's claim that a sale is for resale or otherwise exempt, and the vendor is unable to comply, the sale will be considered taxable and the tax shall be payable by the vendor.

15. Rule 865-19-92S

A. Definitions:

1. "Canned computer software" or "prewritten computer software" means a program or set of programs that can be purchased and used without modification and has not been prepared at the special request of the purchaser to meet their particular needs.

2. "Custom computer software" means a program or set of programs designed and written specifically for a particular user. The program must be customer ordered and can incorporate preexisting routines utilities or similar program components. The addition of a customer name or account titles or codes will not constitute a customer program.

3. "Computer-generated output" means the microfiche, microfilm, paper, discs, tapes, molds, or other tangible personal property generated by a computer.

4. "License agreement" means the same as a lease or rental of computer software.

B. The sale, rental or lease of canned or prewritten computer software constitutes a sale of tangible personal property and is subject to the sales or use tax. Payments under a license agreement are taxable as a lease or rental of the software package. Charges for program maintenance, consultation in connection with a sale or lease, enhancements, or upgrading of canned or prewritten software are taxable.

C. The sale, rental or lease of custom computer software is exempt from the sales or use tax, regardless of the form in which the program is transferred. Charges for services such as program maintenance, consultation in connection with a sale or lease, enhancements, or upgrading of custom software are not taxable.

D. Charges for services to modify or adapt canned computer software or prewritten computer software to a purchaser's needs or equipment are not taxable if the charges are separately stated and identified.

E. The sale of computer generated output is subject to the sales or use tax if the primary object of the sale is the output and not the services rendered in producing the output.

F. This rule cites the most common types of transactions involving computer software and it should not be construed to be inclusive but merely illustrative in nature.